No. 87 746

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MICHAEL H.,

Plaintiff, Cross-Defendant, and Appellant,

and,

VICTORIA D., a minor by and through her Guardian Ad Litem, Leslie Shear,

Defendant, Cross-Complainant, and Appellant,

vs.

GERALD D.,

Defendant, Cross-Defendant, and Appellee.

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether it is a deprivation of the Due Process Clause and/or the Equal Protection Clause under the 14th Amendment to the United States Constitution for a state to create a conclusive statutory presumption regarding the paternity of a child based on the marital status of the mother at the time of birth and apply it to terminate an on-going father-child relationship without an evidentiary hearing as to biological paternity or the best interests of the minor child notwithstanding clear and convincing scientific evidence and the mother's acknowledgement of the putative father's paternity on the basis of which the putative father had volunteered both the emotional and financial responsibility of fatherhood.

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JURISDICTIONAL STATEMENT

Michael H. and Victoria D., the appellants, appeal from the denial of Appellant's petition for review by the Supreme Court of California, dated July 30, 1987. The denial of review by the Supreme Court finalized the Judgment of the Court of Appeal which held that section 621 of the California Evidence Code, on its face, and as applied in this case, does not violate appellant's rights to due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States. Appellants submit this jurisdictional statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is reported at 191 Cal.App.3d 995. It is reprinted in the appendix hereto, *infra*.

JURISDICTION

The Judgment of the Supreme Court of California, denying appellant's petition for review, was filed on July 30, 1987.

A notice of appeal to this Court was duly filed in the Court of Appeal, 2d District, Division Three, of California on October 28, 1987.

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The provisions of 28 U.S.C. section 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code Section 621:

> (a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.
>
> (e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the

consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

California Civil Code Section 7001:

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

California Civil Code Section 7002:

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Civil Code Section 7003:

The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

California Civil Code Section 7004:

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, delaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

California Civil Code Section 7006:

(a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004:

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of detemining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Secton 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services the mother or the personal representative or a parent of the

mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an aciton shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

California Civil Code Section 7008:

The Child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If he is a minor and a party to the action he shall be represented by a guardian ad litem appointed by the court. The natural mother, each man presumed to be the father under Section 7004, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in subdivision (f) of Section 7010 and an opportunity to be heard. The court may align the parties.

(a) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes except for actions brought pursuant to Section 270 of the Penal Code.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued as prescribed in Article 6 (commencing with Section 10450) of Chapter 8, of Division 9 of the Health and Safety Code.

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(d) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts.

RAISING THE FEDERAL QUESTION

In response to a Motion for Summary Judgment, filed by Appellee after the trial court had ordered a psychological evaluation from which all the parties agreed to a continuation of visitation, the appellants raised the claim that California Evidence Code Section 621 is unconstitutional as repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Summary judgment was granted by the Superior Court in favor of appellee.

The due process and equal protection challenges were made again on appeal to the Court of Appeal of the State of California, Second Appellate District, Division Three. The Court of Appeal expressly

considered and rejected appellant's constitutional claims and affirmed the Judgment of the Superior Court. See opinion, *infra*.

The constitutional claims were reiterated by appellants before the California Supreme Court in the Petition for Hearing. The Supreme Court denied appellant's petition for review on July 30, 1987.

STATEMENT OF THE CASE

In around October, 1980, Michael H. and Carole D. were having an affair. As a result of their sexual union, Victoria D. was conceived. On May 11, 1981, Victoria D. was born one month premature. At the time Carole D. was married to Gerald D.

On November 18, 1982, Michael H. brought this action to establish paternity. His action was premised upon (i) a blood (HLA) Human Leucocyte Antigen tissue typing test voluntarily taken by Carole D., Victoria D. and Michael H. on October 29, 1981, performed by the University of California at Los Angeles, the results of which showed a 98.07 percent probability that Michael H. is Victoria D.'s biological father; (ii) Carole D., after becoming estranged from Gerald D., took Victoria D. and moved to the Virgin Islands in January, 1982, to live with Michael H. in a familial relationship until March, 1982; (iii) Michael H. was aware that due to a genetic defect for which he was a potential carrier and transmitter, Victoria D. required specific knowledge concerning her biologic parentage; (iv) From April, 1982 until November, 1982, Carole D. lived for periods of time with a new boyfriend, S.K. in California, with Gerald D. in New

York and Europe and had sporadic contact with Michael H. When it became certain that Carole D. was not going to acknowledge Michael H. as Victoria D.'s biological father, Michael H. filed his paternity action. See opinion, *infra.*

From August 1983 until April 1984, Carole D. and Victoria D. again lived with Michael H. during another period of Carole D.'s estrangement from Gerald D., and during which time Carole D. acknowledged Michael H. as Victoria D.'s father and Victoria D. called Michael H. "Daddy". See opinion, *infra.*

In March of 1984, shortly before Carole D. left Michael H., she signed a Stipulation[1] as did Michael H. acknowledging that Michael H. was Victoria D.'s father. However, when she left Michael H., she instructed her attorney not to file the Stipulation in court. See opinion, *infra.*

Thereafter in June 1984, Michael H. and the Guardian Ad Litem for Victoria sought visitation rights for Michael H. Temporary visitation rights were granted and in effect until October 13, 1987 when a new order superceded it. The trial court appointed an expert to test and evaluate Michael H., Victoria D.,

[1] The Stipulation aside from acknowledging Michael H.'s paternity also:

(A) Determined his current and on-going financial obligation for support.

(B) Contained his agreement to make Victoria D. his sole heir to his estate.

(C) Provided for continuing visitation rights for him and,

(D) Provided that Gerald D. could be recognized as Victoria D.'s step-father and have contact with her if he so desired.

Carole D. and Gerald D., who had resumed a marital relationship with Carole D. and who intervened in around September 1984. Based upon the expert's report[2] in October 1984, the parties (Michael H., Carole D., Gerald D. and guardian ad litem for Victoria D.) stipulated to a 3-year unsupervised visitation schedule to begin in November 1984 between Michael H. and Victoria D. which the trial court entered as an Order of the Court on October 23, 1984.

[2] The expert made the following findings:

(A) Victoria D. is positively attached to all three parent figures, *principally and equally*, Michael H. and Carole D.

(B) . . . we believe it is important for Victoria D. that he (Michael H.) be permitted to remain a member of her family . . . because we perceive Michael H. as the single adult in Victoria D.'s life most committed to caring for her needs on a long-term basis . . . .

(C) We believe it is beneficial to Victoria D. that she be permitted to maintain a relationship with Michael H. . . . it would be unnecessarily hurtful to deprive her of his affection and intellectual stimulation . . . .

(D) . . . nevertheless, the interaction observations clearly indicate that a strong positive mutual attachment exists between Victoria D. and Micahel H. dispite Carole D.'s reference to him in front of Victoria D. as Michael . . . Victoria D. still, on occasion, refers to him as Daddy and on every occasion relates to Michael H. with warmth and comfort.

Based on those findings, the court-appointed expert recommended that Michael H. be recognized as a legal parent of Victoria D. and provided for continuing unsupervised visitation according to a specific three-year schedule with extra provisions for visits on her birthday and Christmas, telephone and mail communications between visits and the continuance of child support obligations, monitored by the court.

Thereafter Gerald D. filed a Motion for Summary Judgment which was opposed by Michael H. and Victoria D.'s Guardian Ad Litem on Constitutional due process and equal protection grounds. The trial court granted Gerald D.'s Motion for Summary Judgment on January 28, 1985,[3] dismissing Michael H.'s Petition for Declaration of Paternity and Guardian Ad Litem's Declaration of a parent-child relationship without any evidentiary hearing on any issue.

At each stage of the appellate process,[4] appellants have reiterated their constitutional challenge to wit, that by reason of a conclusive presumption, California Evidence Code Section 621, appellants have been denied an opportunity to an evidentiary hearing concerning the underlying issues of biological paternity, their right to a continuing relationship and the best interests of the child and such is a deprivation of appellants' equal protection and due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

THE QUESTION IS SUBSTANTIAL

The mainstay of every society throughout history has been the development of the child as a prospective member of that society. The psychologial needs of

[3] On this date the trial court also terminated the prior agreed upon three-year visitation schedule.

[4] On appeal, amicus curiae briefs were filed by The American Civil Liberties Union (A.C.L.U.) in support of Michael H.'s position and the National Council for Children's Rights (N.C.C.R.) in support of Victoria D.'s position.

children and their relationship to their parents have been considered and discussed extensively by professionals in the field including anthropologists, psychologists, sociologists, clergymen, and educators. As in all manner of human affairs, when disputes have arisen concerning rights and obligations flowing from the parent-child relationship, the legal system has been called upon to arbitrate and is expected to provide an equitable resolution to the problem.

In response, legislators and judges, operating at times outside their area of expertise, have endeavored to provide rules and procedures designed to further the perceived interests of society.

In establishing "parental rights," our legal system has with rare exceptions, looked upon the nuclear-biological family for its notion of equitable results, and consequently, the rights and obligations imposed have been imprisoned in constructs surrounding the legal recognition of a "parent". This juridic response at some point becomes overloaded when confronted with rights of foster parents, stepparents, adoptive parents, surrogate mothers, putative fathers and their relationship rights to children which appear to involve an ongoing parent-child familial relationship. See Bartlett, *Rethinking Parenthood, The Need For Legal Alternatives When The Premise Of The Nuclear Family Has Failed*, (1984), 70 Virg. L. R. 879.

On several occasions this Court has been called upon to address the question of who is entitled to legal recognition of a parent-child relationship. *Stanley v. Illinois*, 405 U.S. 645 (1971); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380

(1979); *Lehr v. Robinson*, 463 U.S. 248 (1983). The instant case presents a novel question concerning constitutional protection of the parent-child relationship. This question should be resolved against the backdrop of concepts ennunciated by this Court as to the fundamental rights involved. Indeed, the California courts have recognized what the authorities from this Court have held on this subject:

> The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect . . . .'
>
> The court has frequently emphasized the importance of the family. *The rights to* conceive and *to raise one's children have been deemed 'essential,' Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and [*r*]*ights far more precious ... than property rights,' May v. Anderson*, 345 U.S. 528, 533 (1953). *It is cardinal with us that custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the due process clause of the Fourth Amendment, *Meyer v. Nebraska, supra*, at 399, [and] the equal protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, 405 U.S. 645, 649, 658 (1972) [emphasis added], *quoted in In re Kelvin M., supra*, 77 Cal.App.3d at 400-401.

Here the putative father is being prevented from establishing his parental status where the consequence is the effective termination of what had been an ongoing father-daughter relationship, in the absence of any evidentiary findings and where the evidence pertinent to such findings suggested that the termination was contrary to the best interests of the child. *Michele W. v. Ronald W.*, 39 Cal.3d 354 (1985), *Santosky v. Kramer*, 455 U.S. 745, 755, 758-59 (1982), *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). This untoward result is based on no consideration other than the marital status of the mother, that is her having been married to a man who was not the putative father at the time of the child's birth.

Legislative action in California has resulted in a confusing and sometimes contradictory statutory scheme which bears no relationship to the policy interests originally determined to support a conclusive presumption of paternity. The determination of paternity is now governed by Evidence Code section 621 and California's version of the Uniform Parentage Act codified in Civil Code sectons 7000-7021. The Uniform Parentage Act, adopted by California in 1975, governs paternity proceedings defining the parent child relationship, specifying who may bring an action to determine the existence or nonexistence of such a relationship, and establishing rebuttable presumptions affecting the burden of proof. At the time the Act was

adopted, Evidence Code secton 621 was expressly retained despite the fact that its provisions conflicted with aspects of the uniform act.

Under Civil Code section 7001, the parent child relationship is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Civil Code section 7002 provides that: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Evidence Code section 621 conflicts with these provisions in that it recognizes the mother's husband as the child's "father" and prevents the natural father from establishing a legal parent child relationship.

Evidence Code section 621 is also contrary to the provisions found in Civil Code section 7004. Civil Code secton 7004 establishes presumptions of paternity based upon a man's relationship to the child. Subsection (a)(1) of the section repeats the presumption based upon marriage; however, the presumption is of equal weight with other presumptions based upon psychological relationships. All presumptions within the section may be rebutted by clear and convincing evidence, and conflicting presumptions are resolved in favor of the presumption "which on the facts is founded on the weightier considerations of public policy and logic."

The rational basis of these provisions stands in stark contrast to the seemingly irrational limitations imposed by section 621. Evidence Code section 621 operates to conclusively determine a child's paternity based solely on the marital status of the mother without regard to

biological truth or the best interests of the parties involved. The rebuttable presumptions of the Uniform Parentage Act permit a legal determination of paternity which takes these factors into account. The presumption of paternity contained in section 621 needlessly imposes restriction on the establishment of a legal parent child relatonship between a biological parent and child.

The primary rationale given by the California Courts, *viz.*, concern for the integrity of the nuclear family, does not justify the harsh result produced in this case. While it may be the laudable intention of the California legislature to support the nuclear family as an institution, Section 621 is not a rational device for doing so. This is because the application of Section 621 is capable of producing too many anomalous results, some of which not only fail to promote the nuclear family as an institution, but in fact work against it.

For example, under Section 621 the child's natural mother and her husband have full power to seek to establish paternity in someone other than the husband, despite the fact that such an act could be more disruptive to a family than any claim by an outsider. In addition, in the instant case had Carole D. and Gerald D. married after Victoria D. was born and maintained a nuclear family including the child,[5] Section 621 would have no affect on a claim by Michael H. or any other third person to be the child's natural father. On the other hand, if Carole D. and Gerald D. had divorced one month after Victoria D. was born and

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[5] Perhaps based on Carole's representation that Gerald was the father of her child conceived out of wedlock.

Carole D. and Michael H. married two years later and lived with Victoria D. as a nuclear family, Section 621 would permit Gerald D. to defeat any effort by Michael H. to establish himself as Victoria D.'s biological father. *Michele W. v. Ronald W., supra.*

In reality in the instant case it does not appear that the effort by Michael H. to preserve his relationship with his biological child is a critical factor affecting the viability of the family unit consisting of Carole D., Gerald D., and Victoria D., anymore than would be the case if Michael H. were a divorced former husband of Carole D.'s. In fact, the critical element on which the family unit of Carole D., Gerald D., and Victoria D. seems to depend is Carole D.'s choice of a male companion. Michael H.'s rights and Victoria D.'s interest should not be determined with reference to the continued existence of Carole D.'s., marriage to Gerald D., particularily in light of what the record below revealed as to the instability of that relationship. The real issue in this case is whether, if Section 621 compels the perverse result that the facts here demonstrate, it passed Consitutional muster.

What actually happened to the parties in this case under the auspicies of a statute purporting to protect a great American institution should not be ignored. When Carole D. decided that she wished to be with Michael H. rather than Gerald D. she acknowledged Michael H. as the father of Victoria D. and the three of them lived as a family. Consequently, a parental bond was developed between Michael H. and Victoria D. that was stronger than and not dependant on any continuing relationship between Michael H. and Carole D. When Carole D. tired of Michael H. and decided to

resume her relationship with her theretofore estranged husband Gerald D., she wielded the sword of Section 621 to sever the parent-child relationship between Michael H. and Victoria D. that Carole D.'s previous actions, when she deemed it in her interests, had helped to foster. What Seciton 621 has done in this case has nothing to do with the institution of the family. The application of Section 621 has had no more lofty consequence than to facilitate the desire of a woman to maniuplate her environment. At the bottom end, Michael H.'s and Victoria D.'s mutual love now has no outlet for its expression, and Victoria D.'s interest in the benefits derived from a caring, committed parent, albeit not a custodial parent, is denigrated.

The Court below also purported to justify its decision on Victoria D.'s interest in not being branded a child of an adulterous relationship. It should be noted, however, that this hypothesized interest of Victoria D. is far from absolute. It could have been overcome at the whim of the mother's husband. It could have been overcome by the concerted action of the mother and the biological father who was not the husband. It could have been overcome if the marriage ended after conception but before birth. What the Court below ruled, however, was that the child's interest in presumed legitimacy could not, under any circumstances, be overcome or outweighed by her interest in the benefits of a continuing parent-child relationship with Michael H., not necessarily to the exclusion of a continuing parent-child relationship with Gerald D.

In any event, Victoria D.'s interest in her status of legitimacy, while arguably substantial, has to be weighed against both her interests in knowledge of her

lineage,[6] her interest in maintaining an important attachment with Michael H. and Michael H.'s interest in being acknowledged as her father and not being deprived of all contact with her.

While the state interest in protecting children from the stigma of illegitimacy is well recognized, the trend is away from doing so through the device of conclusive presumptions. See Comment, California's Conclusive Presumption of Legitimacy: Jackson v. Jackson and Evidence Code Section 621, 19 Hastings L. J. 963, 194 (1968), Comment, California's Conclusive Presumption of Legitimacy: Its legal Effect and Its Questionable Constitutionality," 35 S. Cal. L. Rev. 437, 439 (1962).

One alternative approach which has in fact been adopted in California is simply to eliminate "legitimacy" as a concept having legal significance.

California has by statute abolished the distinction between legitimate and illegitimate children. *See* California Civil Code sections 7001 and 7002. Even if this policy consideration had continued validity today, section 621 is not tailored to further it. The section permits a husband to establish that he is not the child's

[6] This knowledge has particular importance under the peculiar facts of this case. Michael H. is a carrier of a genetic syndrome called Laurence-Moon-Beidl (LBD) which can produce severe retardation and developmental disabilities in the offspring of a union of two carriers. His son, William Darrow, from a prior marriage was born with severe developmental disabilities as a consequence of LBD. Victoria D. may be a carrier and so might her issue. The seriousness of that possibility is an added reason entitling Victoria D. to know the truth as to who her biological father is.

father while denying the natural father the opportunity to establish he is the child's father.

Policy considerations which may once have justified a conclusive presumption of paternity based upon marriage have lost considerable vitality as a result of cultural and scientific changes over the years.[7] Attempting to respond to these changes legislators have amended statutes involving these presumptions to render them rebuttable under certain situations.

The Court in *Gomez v. Perez*, 409 U.S. 535 (1973) and *Levy v. Louisiana*, 391 U.S. 68 (1968) has eliminated any significant distinctions based on the legitimacy of children.

The use by the states of Conclusive Presumptions as a means of fashioning social policy has been called into serious question by this Court. In *Vlandis v. Kline* 412 U.S. 441, 446, 448-452 (1973), this Court expressed the view that Conclusive Presumptions were Constitutionally suspect where (1) the presumed facts are not universally true; (2) reasonable alternative means exist to determine actual facts; and (3) the presumption affects an important right or one enjoying Constitutionally protected status. *Id.* at 452.

While the Conclusive presumption of Section 621 is not directed toward a resolution of a factual issue, but instead seeks to establish a substantive legal principle this distinction does not cure, and if anything exacerbates the constitutional defect. As this Court said in *Stanley v. Illinois, supra*, procedure by presumption is permissible, but only when it does not

[7] See Comment, *Cutchember v. Payne: Approaching Perfection in Paternity Testing*, 34 Cath.U.L.Rev. 227 (1984).

foreclose the determinitive issues in a way which tramples upon the constitutional rights of natural fathers and their children.

The decisions of the California Courts upholding the conclusive presumption of Section 621 against Constitutional attack are at odds with a decision by a Colorado court striking down, as violative of the Equal Protection Clause of the Fourteenth Amendment, a substantially similar provision, *R.Mc.G. v. J.W.*, 615 P.2d 666 (Colo. 1980) (Striking down section 19-6-107 of C.R.S. 1973 (1978 Repl. Vol 8))

Where interests of critical Constitutional importance are involved, such as the rights of a parent to be recognized as such or the right of a child to a relationship with a parent, the protections afforded should not vary diametrically from state to state.

As stated in *Evans v.* U.S. 707 F.2d 582, at 602 (1983), "Rights of the sort asserted by the Plaintiff's are not absolute (termination of a parent-child relationship) when incompatible with sufficiently potent public interest they must give way . . . severance of the relationship between a parent and his child will survive constitutional scrutiny only if form requirements are met (a) the asserted governmental interest must be compelling; (b) there must be a particularized showing that the state interest in question would be promoted by terminating the relationship; (c) it must be impossible to achieve the goal in qustion through any means less restrictive of the rights of parent and child; and the affected parties must be accorded to procedural protections mandated by the due process clauses."

California Evidence Code Section 621 is not tailored to legitimate state interests with the necessary precision. There are alternative means available which could accomplish the professed objective, without interfering with existing bonds that the state should protect, not terminate. For example, the state could employ a rebuttable presumption which established a strong preference for the recognition of the mother's husband as the legal father of the child. This would still leave room, however, for a putative biological father to establish, in an evidentiary hearing, that circumstances existed justifying a deviation from the presumption. Such circumstances would include; (1) Acknowledgement by the mother of his paternity; (2) The assumption of parental responsibility; (3) The existence of a defacto[8] psychological parental relationship; (4) Clear and convincing evidence of biological paternity and; (5) The best interests of the child.

In sum, the fundamental constitutional deficiencies of Section 621 are as follows: It deprives a putative biological father of Due Process of law by defeating a fundamental interest through the device of a conclusive presumption. It deprives a putative father of the Equal Protection of the law through an invidious, gender-based discrimination. Whenever a married woman has sex with a man other than her husband and

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[8] De facto parent as a concept is recognized in California as a substantial one which plays a significant role in our society deserving of legal protection. What this means is to refer to that person who, on a day-to-day basis, assumes the role of parent seeking to fulfill both the child's physical needs and his psychological need for affection and care. *In re B.G.*, 11 Cal.3d at p. 692, Fn. 8 (1974)

a child is born of that extramarital sexual union, the female participant has the right to circumvent the so-called conclusive presumption, but the male participant does not.[9]

In the present case section 621 operates to intervene, sever and terminate an already recognized existing parent-child relationship.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

DATED: October 28, 1987

Respectfully submitted,

NEWMAN, AARONSON, KREKORIAN & VANAMAN

VALERIE VANAMAN

14001 Ventura Boulevard
Sherman Oaks, California 91423
Counsel for Appellant

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[9] Ironically, the same statute invidiously discriminates against women with respect to the marital relationship. While the male spouse can seek to circumvent the so-called conclusive presumption unilaterally, the female spouse can do so only if the putative biological non-spouse father is willing to acknowledge paternity in an affidavit.

APPENDIX A

Notice of Appeal

APPENDIX A

IN THE
UNITED STATES SUPREME COURT

MICHAEL H.,	)	COURT OF APPEAL
	)	2d DISTRICT
Plaintiff,	)	DIVISION THREE
Cross-defendant,	)	CASE NO.
and Appellant,	)	B015384
	)	S001251
and	)	
	)	
VICTORIA D., a minor by	)	SUPERIOR
and through her	)	COURT NO.
Guardian Ad Litem,	)	CF022753
Leslie Shear,	)	
	)	
Defendant,	)	
Cross-complainant,	)	
and Appellant,	)	
	)	
vs.	)	
	)	
GERALD D.,	)	
	)	
Defendant,	)	
Cross-defendant,	)	
and Appellee.	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MICHAEL H. and VICTORIA D., the Appellants above named, hereby appeal to the Supreme Court of the United States from an order denying review after judgment by the Court of Appeal rendered by the Supreme Court of the State of California, entered in this action on July 30, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Valerie Vanaman

VALERIE VANAMAN
Counsel for Appellants

APPENDIX B

Opinion of the Court of Appeal of the State of California

APPENDIX B

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MICHAEL H. *v.* GERALD D.
191 Cal.App.3d 995; — Cal.Rptr. — [Apr. 1987]

[Nos. B015384, B018241. Second Dist., Div. Three. May 7, 1987]

MICHAEL H., PLAINTIFF,
Cross-defendant and Appellant, v.
GERALD D.,
Defendant, Cross-defendant and Respondent;
VICTORIA D.,
a Minor, etc., Defendant, Cross-complainant and Appellant.

COUNSEL

Newman, Aaronson, Krekorian, Vanaman and Joel Aaronson for Plaintiff, Cross-defendant and Appellant.

Paul Hoffman, Gary Williams and Patricia Erickson as Amici Curiae on behalf of Plaintiff, Cross-defendant and Respondent. (For A.C.L.U.)

Shear & Kushner, Leslie Ellen Shear and Elliot Kushner for Defendant, Cross-complainant, and Appellant.

Michael Louis Oddenino as Amicus Curiae on behalf of Defendant, Cross-complainant and Appellant. (For N.C.C.R.)

Larry Hoffman and Glen H. Schwartz for Defendant, Cross-defendant and Respondent.

OPINION

ARABIAN, J.—

INTRODUCTION

Plaintiff, cross-defendant and appellant Michael H. brought this reverse paternity action against defendant, cross-defendant and respondent, Gerald D.; his wife, defendant and cross-defendant, Carole D.; and defendant, cross-complainant and appellant Victoria D.; to establish that he is Victoria D.'s biological father and to establish a father/child relationship with her. The trial court appointed a guardian ad litem/attorney to represent Victoria D.'s interests in the action and she filed a cross-complaint to establish a legal or de facto/psychological parent-child relationship with Gerald D. and/or Michael H. Gerald D. moved for summary judgment on the first amended complaint and the cross-complaint on the ground that there were no triable issues of fact regarding application of the conclusive presumption of Evidence Code section 621, subdivision (a), that the issue of a married woman cohabiting with her husband, who is not impotent or

sterile, is a child of that marriage. The trial court granted the motion and Michael H. and Victoria D. separately appealed.[1]

FACTS

Carole D. and Gerald D. were married and commenced living together as husband and wife on May 9, 1976. While still married and living together as husband and wife, Carole conceived and, on May 11, 1981, gave birth to Victoria D. Carole D. had an extra-marital affair with Michael H. during the period the parties agree Carole D. conceived Victoria D.

After Victoria D. was born, Carole D. told Michael H. she believed the child could be his. On October 29, 1981, Carole D., Michael H. and Victoria D. had blood tests performed at the University of California at Los Angeles. Those tests show that there is a 98.07 percent probability that Michael H. is Victoria D.'s biological father. Carole D. separated from Gerald D. in October of 1981, and Gerald D. left Los Angeles for New York City where he had obtained employment. Thereafter, Carole D. and Victoria D. went to live with Michael H. in St. Thomas. They lived with him for three months, from January of 1982 to March of 1982.

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[1] The judgment in this case was filed on October 22, 1985. The notices of appeal of Michael H. and Victoria D. were prematurely filed following the trial court's order granting the summary judgment. Rule 2(c), of the California Rules of Court, provides in pertinent part; "A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry." Therefore, we have determined the premature notices of appeal are valid. (See 9 Witkin, Cal. Procedure (3d ed. 1985). Appeal, § 412, pp. 410- 411.)

Carole D. and Victoria D. returned to Los Angeles after leaving Michael H. They visited Gerald D. in New York one month in the spring of 1982, one month in the summer of 1982, and then went with him to Europe for three weeks in the fall of 1982. Thereafter, Carole D. and Gerald D. decided to reconcile.

On November 18, 1982, Michael H. brought the instant action.

In March of 1983 through July of 1983, Carole D. and Victoria D. lived with Gerald D. in New York. Carole D. and Victoria D. returned to Los Angeles in July, and in August of 1983, they again took up residence with Michael H. They lived with Michael H. until April of 1984, and during this time Carole D. acknowledged Michael H. as Victoria D.'s father and Victoria D. called him "daddy."

In March of 1984, shortly before Carole D. left Michael H., she signed a stipulation acknowledging tht Michael H. was Victoria D.'s father. However, when she left Michael H., she instructed her attorney not to file the stipulation in court. In June of 1984, Carole D. and Gerald D. again reconciled.

Thereafter, both Michael H. and Victoria D., through her guardian ad litem/attorney, sought visitation rights for Michael H. pendente lite.[2]

To assist the court in making appropriate visitation orders, Dr. Norman Stone was appointed to test and evaluate Michael H., Victoria D., Carole D., and Gerald D. In his evaluation report, Dr. Stone recommended that Michael H.'s interaction with

[2] During many of the periods when Michael H. and Carole D. were separated, Michael H. sent Carole D. money to support herself and Victoria D.

Victoria D. be strictly limited and that he not be assigned major caretaking responsibilities, even to the extent of a "standard"" visitation schedule, because of the potential harm to Victoria D. However, Dr. Stone recommended tht Michael H. be permitted to remain "a member of her family," because he perceived Michael H. "as the single adult in Victoria's life most committed to caring for her needs on a long-term basis."

Dr. Stone's evaluation of Michael H. indicated that Michael H.'s personality has failed to bring him the close relationship he seeks, leading him to feel victimized, and that those feelings exacerbate his sympathy-eliciting and aggressive pursuit of relationships, establishing a potentially endless cycle. While Dr. Stone found no evidence of any inappropriate sexual contact between Michael H. and Victoria D., he observed that Michael H. "exhibits virtually all of the characteristics associated with parents who engage in incestuous-type relationships."

Dr. Stone concluded that Carole D. was child-like and had a limited capacity to be intimate or self-sacrificing to the degree which normally characterizes relationships between parents and children and between spouses. Gerald D. was found to be a kind and intelligent man who has a real attachment to both Carole D. and Victoria D. and who clearly demonstrates the capacity to be a fine parent.

Based on Dr. Stone's report, in October of 1984, the parties stipulated to a visitation schedule. It was filed by order of the court on October 13, 1984. This plan was followed until the court granted Gerald D.'s motion for summary judgment on January 28, 1985,

with respect to the first amended complaint and the cross-complaint.

Carole D. and Gerald D. are still married and living with Victoria D. (and their new two-month old baby boy) at this time.

CONTENTIONS

Michael H. contends:

I. "The presumption in Evidence Code section 621 should apply to promote the best interests of the child.

II. "The actions of [Carole D. and Gerald D.] constitute an equitable bar to the application of section 621."

Victoria D. contends:

I. "The trial court erred in dismissing without trial that portion of the Victoria's cross-complaint which sought to preserve the psychological parent and child relationship between Victoria and Michael, and to establish visitation rights under Civil Code section 4601."

II. "Application of Evidence Code section 621 to terminate the relationship between Victoria and Michael deprived Victoria of her rights under the due process and equal protection provisions of the United States and California Constitutions to maintain a relationship with a biological parent with whom she had established a psychological relationship."

III. "The motion for summary judgment was premature, in that discovery was incomplete and had been thwarted by the refusal of Carole and Gerald to answer questions propounded at their depositions."

IV. "Triable issues of fact existed as to the issues of cohabitation, stability, custody/visitation, support, attorneys fees, and the existence of psychological parent- child relationship as well as the facts necessary to determine whether Evidence Code [section] 621 might be constitutionally applied."

V. "Gerald and Carole were estopped from denying that Michael had a legal, biological, and psychological relationship with Victoria."

VI. "Gerald's failure to timely file a separate statement of material facts required defeat of his motion for summary judgment."

DISCUSSION

I. *Standard of Review*

(1) "Inasmuch as this case reaches this court on appeal from a summary judgment in favor of the defendant [and cross-defendant Gerald D.], it is only necessary for us to determine whether there is any *possibility* [Michael H. and Victoria D.] may be able to establish [their] case[s]. (*Tresemer v. Barke* (1978) 86 Cal.App.3d 656, 661-662 [150 Cal.Rptr. 384, 12 A.L.R.4th 27]; *Frazier, Dame, Doherty, Parrish and Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 Cal.App.3d 331, 338-339 [138 Cal.Rptr. 670].) (2) Summary judgment is properly granted where the evidence in support of the moving party conclusively– negates a necessary element of the plaintiff's case or establishes a complete defense and thus demonstrates that under no hypothesis whatever is there a material factual issue which requires the process of a trial. (*Ibid.*; accord, *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 362 [178 Cal.Rptr.

783, 636 P.2d 1121].) . . . 'The purpose of the summary procedure is to penetrate through evasive language and, adept pleadings and ascertain the existence or absence of triable issues.' (*Chern v. Bank of America* [1976] 15 Cal.3d [866,] 873 [127 Cal.Rptr. 110, 544 P.2d 1310].)" (*Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 850 [200 Cal.Rptr. 674].)

II. *The Trial Court Did Not Err in Denying the Request of Victoria D. That the Summary Judgment Motion Be Denied for Procedural Irregularity.*

(3) Victoria D. contends that the trial court erred in granting the summary judgment motion because Gerald D. failed to timely file his statement of material facts.

Code of Civil Procedure section 437c, subdivision (b), requires a party moving for summary judgment to include in his papers supporting the motion a statement of the facts he contends are undisputed and provides the failure to comply with said requirement "may in the court's *discretion* constitute a sufficient ground for denial of the motion." (Italics added.) Subdivision (a) of that statute further provides that the moving papers, including the separate statement, be served, if service is by mail, not less than 33 days (28 + 5) before the hearing.

Gerald D. did not file and serve a separate statement when he filed and served his motion for summary judgment on October 9, 1984. The motion, originally set for hearing on November 16, 1984, was continued, first to January 14, 1985, and then to January 28, 1985, when the motion was heard. Gerald D.'s statement was served by mail on December 21, 1984. Thus, Gerald D.'s statement was served 38 days before January 28, 1985, when the motion was actually heard. That being

so, we cannot say that appellants were prejudiced or that the trial court abused its discretion by refusing to deny the summary judgment motion on the ground the statement was filed late.

III. *The Summary Judgment Was Not Prematurely Granted.*

(4a) Victoria D. contends the trial court erred in reaching the merits of the summary judgment motion, in failing to order a continuance, and in failing to grant her motion to compel discovery, which was heard at the same time as the motion for summary judgment. Victoria D. asserts that discovery was incomplete, having been thwarted by the refusal of Carole D. and Gerald D. to answer questions at their depositions which their attorneys deemed irrelevant to these proceedings.

Victoria D. cites to former Code of Civil Procedure section 437c, subdivision (h), which, when the summary judgment was granted, provided: "If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as may be just."[3]

Victoria D. argues that under *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354 [216 Cal.Rptr. 748, 703 P.2d. 88], app. dism. (1986) ___U.S.___[88 L.Ed.2d 754, 106 S.Ct. 774], the section 621 presumption is rebuttable and that she was entitled, before the summary judgment was granted, to discover facts which

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[3] The present version of the statute was effective January 1, 1987 (Stats. 1986, ch. 540, § 3).

transcended the preliminary facts of marriage, cohabitation and sterility/nonsterility. She argues also that she should have been allowed to discover facts behind the bare assertions of Gerald D. and Carole D. that he is not sterile nor impotent and that they cohabited during the relevant period. For example, Victoria D. believes she should have been able to inquire into what Carole D. and Gerald D. meant when they said they enjoyed "regular" sexual relations, since they did not specify the frequency. Victoria D. would also like to discover their business and medical records to ascertain exactly when they were together and the exact date of conception. Victoria D. asserts further that triable issues remain regarding the existence of a de facto parent-child relationship with Michael H., since she sought care, supervision and rights of inheritance from both Michael H. and Gerald D.

In granting the motion for summary judgment, the court necessarily found that Carole D. and Gerald D. were married and cohabitating and that Gerald D. was neither impotent nor sterile when Victoria D. was conceived and born. Thus, it denied as irrelevant after summary judgment Victoria D.'s concurrent motion to compel answers to questions propounded at the deposition of Carole D. and Gerald D. (Code Civ. Proc., § 2034, subd. (a)), to compel Carole D.'s further deposition in Los Angeles (Code Civ. Proc., § 2019, subd. (b)(2)) and for an award of her attorneys' fees and costs incurred in taking the original depositions of Carole D. and Gerald D.

We find that there were no triable issues that pertained to the preliminary facts which must be established to invoke the conclusive presumption of section 621.

(5) "The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. (*Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657].) In addition, the rule protects the innocent child from the social stigma of illegitimacy. (*In re Marriage of B.* (1981) 124 Cal.App.3d 524, 529-530 [174 Cal.Rptr. 429].) Although the Uniform Parentage Act, adopted in California in 1975 (Civ. Code, § 7000 et seq.), attempts to remove the legal effect of illegitimacy, the Legislature nevertheless retained the conclusive presumption of Evidence Code section 621, in contrast to the other presumptions under the act, which are rebuttable. (Civ. Code, § 7004, subds. (a), (b); 7 Pacific L.J. (1976) 411, 412; Note (1976) 28 Hastings L.J. 191, 207.)" (*Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623 [179 Cal.Rptr. 9], app. dism. (1982) 459 U.S. 807 [74 L.Ed.2d 45, 103 S.Ct.31].)

(4b) The parties do not dispute the fact that Carole D. and Gerald D. were married during the relevant time periods and the affidavits of Carole D. and Gerald D. establish that fact. Further, the statements of Carole D. and Gerald D. in their respective affidavits are sufficient to establish that they cohabited during the relevant time period and that Gerald D. was not sterile nor impotent.

Specifically, in her affidavit, Carole D. states that she and Gerald D. resided together continuously, from the date of their marriage, May 9, 1976, until October of 1981, except for intermittent periods when they were

apart for reasons pertaining to their respective careers. In his deposition, Gerald D. testified that he lived in Playa del Rey, California, from 1976 until 1981, during which time he maintained no other residence and maintained no telephone other than the one at his Playa del Rey residence and that when Carole D. was out of town for work assignments, he traveled to visit her at the place where she was working. These facts are not contradicted.

The affidavits of Carole D. and Gerald D. establish, and no one disputes that, Victoria D. was conceived in September of 1980. Even the affidavits of Michael H. in opposition to the summary judgment motion establishes that Carole D. and Gerald D. were cohabitating at that time. Michael H. relates that he came to Los Angeles in June of 1980 when Gerald D. was leaving the city and that he saw Carole D. on a regular basis during July, August, and September of that year "[e]ven when Gerald, Carole's husband, *was in Los Angeles* . . . ." (Italics added.)

Both Carole D. and Gerald D. stated in their affidavits that they engaged in sexual intercourse regularly throughout their marriage. These facts are sufficient to establish cohabitation. (See *Vincent B. v. Joan R., supra*, 126 Cal.App.3d at p. 623.) The statements of Michael H. in his affidavit, that Carole D. told him that she and Gerald D. were using separate bedrooms and that they were no longer having sexual intercourse, does not create a triable issue of fact. "Cohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is irrelevant." (*Ibid.*)

Gerald D. declared in his affidavit: "I am not now, nor have I ever been, impotent or sterile. In addition to

the pregnancy which gave birth to Victoria, on two previous occasions I impregnated Carole: The first pregnancy terminated by miscarriage and the second by therapeutic abortion." In the affidavit of Carole D., she stated that she has never known Gerald D. to be impotent and had no knowledge that he is sterile. She also confirmed that she has twice before conceived a child as a result of intercourse with Gerald D. Those statements by Gerald D. and Carole D. are sufficient to establish that Gerald D. is not impotent nor sterile. (See *Vincent B. v. Joan R., supra*, 126 Cal.App.3d at pp. 623-624.) The statement of Michael H. in his affidavit, that Carole D. told him that she had never been pregnant as a result of sexual intercourse with Gerald D., does not change that result. Even assuming Carole D. made such a statement, nothing in the statement suggests that sterility is the reason she was never impregnated by Gerald D. (*Id.*, at p. 624.) Michael H. has the burden in these circumstances to prove that Gerald D. is sterile or impotent. (*Ibid.*) He has failed to meet that burden.

Thus, there are no triable issues of fact as to the usual preliminary facts required for application of the conclusive presumption of section 621.

There is also no merit to Victoria D.'s assertion that the court should have deferred ruling on the summary judgment until blood tests could be taken of Carole D., Gerald D., and Victoria D. Blood tests are only admissible to contradict the conclusive presumption under circumstances not here relevant. (See Evid. Code, § 621, subds. (b), (c), (d).)

Further, as we discuss under sections IV, V, and VI of this opinion, *infra*, there were no relevant triable issues of fact on which the court required further

evidence to determine (1) whether, under the circumstances of this particular case, the conclusive presumption of section 621 is limited and (2) whether Michael H. is entitled to a de facto/psychological parent-child relationship with Victoria D.[4]

Thus, it follows that the trial court did not act prematurely in reaching the merits of the summary judgment motion, as Victoria D. contends. However, the court did err in prematurely concluding the proceedings without allowing Victoria D. to establish her claim for attorneys' fees and costs set forth in her concurrent motion which was denied as being irrelevant after the summary judgment. Upon remand, the court may issue a separate order in this regard.

IV. *Neither Michael H. Nor Victoria D. Were Deprived of Their Constitutional Rights by the Application of Section 621 Under the Circumstances of This Particular Case.*

Victoria D. and Michael H. separately contend that application of section 621 to terminate their relationship deprived them of rights under the United States and California Constitutions. They correctly assert that in *Michelle W. v. Ronald W., supra,* 39 Cal.3d 354, the California Supreme Court left open the validity of section 621 as applied to a situation where the state is preventing the establishment of a relationship between a putative father and child. (*Id.* at p. 362, fn. 4.)

As did the putative father and daughter in *Michelle W.,* Michael H. and Victoria D. assert alternative grounds for holding section 621 unconstitutional. First,

[4] The parties agreed at oral argument that no evidence other than that which appears in this record on appeal is necessary to make these determinations.

they assert that section 621 prevents them from establishing the biological parent-child relationship in a court of law, thus depriving them of a liberty interest protected by the due process clause. Second, amicus curiae for Victoria D., National Council for Children's Rights, Inc., also makes the equal protection argument that the statute allows mothers and presumed fathers to rebut the presumptions of legitimacy (Evid. Code, § 621, subds. (b), (c), (d)), but denies Victoria D. the same opportunity.

A. *Due Process Claims.*

(6) The issue whether section 621 adequately protects a putative father's interests "'must be resolved by weighing the competing private and state interests.'" (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 360; *In re Lisa R.* (1975) 13 Cal.3d 636, 648 [119 Cal.Rptr. 475, 532 P.2d 123, 90 A.L.R.3d 1017], cert. den. (1975) 421 U.S. 1014 [44 L.Ed.2d 682, 95 S.Ct. 2421], rehg. den. (1975) 423 U.S. 885 [46 L.Ed.2d 116, 96 S.Ct. 159].)

Likewise, we must apply a balancing test to determine whether the child is denied due process by operation of section 621. (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 363; see *Estate of Cornelious* (1984) 35 Cal.3d 461, 467 [198 Cal.Rptr. 543, 674 P.2d 245], app. dism. (1984) 466 U.S. 967 [80 L.Ed.2d 812, 104 S.Ct. 2337].)

Michael H.

(7) While the interest of Michael H. in establishing that he is the biological parent of Victoria D. may be substantial, the interest of Michael H. is outweighed by the state's interest in upholding the integrity of the family (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p.

362; *Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]), and in protecting the child's welfare (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 362; compare *In re Lisa R., supra,* 13 Cal.3d at pp. 649-650).

We appreciate that Michael H. has shown an interest in Victoria D. almost since her birth, has established an affectionate relationship with her and has at times even contributed to her support. However, the state's interest in preserving the integrity of the matrimonial family is so significant that it outweighs most other interests. (*Kusior v. Silver, supra,* 54 Cal.2d at p. 619 ["there are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned"].)

In *Stanley v. Illinois* (1971) 405 U.S. 645 [31 L.Ed. 2d 551, 92 S.Ct. 1208], and *In re Lisa R., supra.* 13 Cal.3d 636, there was also a state-threatened termination of a developed parent-child relationship. The difference between those cases and this case, however, is clear. "In both *Stanley* and *Lisa R.,* the putative fathers were seeking to establish their legal relationship with children who otherwise had no parents and were wards of the state." (*Estate of Cornelious, supra,* 35 Cal.3d at p. 466; see *Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 362; *Vincent B. v. Joan R., supra,* 126 Cal.App.3d at pp. 624-626.) Here, Gerald D. and Carole D. are now living together with Victoria D. and their new baby boy as a family unit. The state's interest in maintaining that family in considerable.

Moreover, there are competing private interests in this case which were not present in *Stanley* and *Lisa R.* Carole D. and Gerald D., who have custody of Victoria

D., oppose this action and do not desire that Victoria D. have contact with Michael H.

On this record, the significant interest of the state in protecting the welfare of Victoria D. is best served by upholding the conclusive presumption that Gerald D. is her legal father. (See *Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 362; cf. *In re Lisa R., supra,* 13 Cal.3d at pp. 649-650).

We hold Michael H.'s "private interest in establishing a biological relationship in a court of law is overriden by the substantial state interests in familial stability and the welfare of the child." (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 363.) Thus, with respect to Michael H., the application of section 621 to this case comports with the requirement of due process of law.

Victoria D.

(8) The interest of Victoria D. in a legal determination of who her biological father is, under the particular circumstances of this case, is also outweighed by the state's interests, described, *supra.* (See *Estate of Cornelious, supra,* 35 Cal.3d 461.)

Section 621 does not purport to factually determine the biological paternity of a child (*Kusior v. Silver, supra,* 54 Cal.2d at p. 619) nor do the actions of judges create or sever genetic bonds (*Lehr v. Robertson* (1983) 463 U.S. 248 [77 L.Ed.2d 614, 103 S.Ct. 2985]). (See *Michelle W. v. Ronald W., supra,* 39 Cal.3d at pp. 362-363.)

The state has an "interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and

emotional strength and stability." (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 363.)

Given the fact that Victoria D. has a legal father and that he and Carole D., Victoria D.'s mother, oppose the attempt of Michael H. to have himself declared her biological father, the welfare of Victoria D. would be harmed, not protected if she were permitted to rebut the conclusive presumption of legitimacy.

Moreover, notwithstanding this state's adoption of the Uniform Parentage Act, which rendered illegitimacy to be without any legal effect (*Michelle W. v. Ronald W., supra.* 39 Cal.3d at p. 362, fn. 5), this resolution protects Victoria D. "against the social stigma of being branded a child of an adulterous relationship" (*Vincent B. v. Joan R., supra,* 126 Cal.App.3d at p. 626).

Therefore, Victoria D. was not denied due process by the application of section 621 in this particular case.

B. *Equal Protection Claim.*

(9) The argument of amicus curiae for Victoria D., that section 621 allows mothers and presumed fathers to rebut the presumption of legitimacy, but denies the presumed legitimate child the same opportunity, must also fail. In *Michelle W.*, the California Supreme Court's most recent decision in this area, it declared: "[W]e have declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate *child*. Rather, we have applied the balancing test analysis of *Lisa R.* and *Estate of Cornelious.*" (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 365, italics added.)

V. *Gerald D. Is Not Estopped From Asserting the Conclusive Presumption of Section 621.*

(10a) Michael H. and Victoria D. assert that Carole D., and thereby Gerald D., should be estopped from barring Michael H.'s claim of paternity with section 621. We disagree.

That statutory scheme allows the use of blood test evidence to rebut the conclusive presumption of section 621 (subd. (b)), but only within two years from the child's date of birth (subds. (c), (d)) and only by (1) the husband (subd, (c)) *or* (2) by the mother if the child's biological father has filed an affidavit with the court acknowledging paternity of the child (subd. (d)).

Evidence Code section 623 provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

(11) "The essence of an estoppel, if it is applicable at all in these circumstances, is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury." (*In re Lisa R., supra.* 13 Cal.3d at p. 645; *El Rio Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 194 [213, P.2d 1] cert. den. (1950) 340 U.S. 850 [95 L.Ed. 623, 71 S.Ct. 77].)

(10b) The estoppel claims of Michael H. and Victoria D. are based on the following facts: that their blood tests showing the probable paternity of Michael H. were performed less than six months after the birth of Victoria D.; that Michael H. filed this action acknowledging paternity when Victoria D. was just one and one-half years old; that counsel of Carole D. filed for a summary adjudication in May of 1983, but then

took the matter off calendar when Carole D. resumed living with Michael H., holding him out as the father of Victoria D.; that just before the two-year period expired, Carole D. executed a stipulation for judgment declaring Michael H. to be the father of Victoria D., but then instructed her counsel not to file it in court; that Gerald D. acquiesced in the paternity of Michael H. inasmuch as he did not join in the instant action until 1984 although he was earlier served with summons; and that Carole D. participated in the maintenance of a father-daughter relationship between Victoria D. and Michael H.

While these facts may all be true, they do not demonstrate that Carole D. induced Michael H. "to his detriment to act in any manner he would not otherwise have acted in these proceedings." (*In re Lisa R., supra,* 13 Cal.3d at p. 645.)

The fact remains that under the statutory scheme Michael H. could not act *alone* to rebut the conclusive presumption of section 621. That section (subd. (d)) requires the putative father and the mother to act *together* within two years to overcome the presumption. "[T]he plain word of the statute indicates that the rights of the natural married mother and the natural unwed father are conditioned upon each other.." (*Michelle W. v. Ronald W., supra,* 39 Cal.3d at p. 365.)

Plainly, Carole D. found difficulty in resisting the pressure of Michael H. to assist him in his pursuit of a judicial declaration of his paternity. That she did each time fail to take the final critical step is not evidence that she nor Gerald D. should not be estopped from barring the quest of Michael H. for legal parenthood with the conclusive presumption of section 621.

Simply put, Michael H. could do nothing different in this action without the cooperation of Carole D. no matter how she or Gerald D. behaved and no matter what they said or did. In fact, any delay Michael H. endured in pressing his claim served to enhance not prejudice his case, since it was based in great part on his assertion that Victoria D. had come to know and love him over the years.

VI. *The Trial Court Did Not Err in Failing to Hold That Michael H. Is the De Facto/Psychological Parent of Victoria D. or That Michael H. Is Entitled to Visitation Rights.*

(12) Victoria D. contends that trial court erred in dismissing without trial that portion of the cross-complaint of Victoria D. which sought to preserve the de facto/psychological relationship between Victoria D. and Michael H. and to establish visitation rights pursuant to the second sentence of Civil Code section 4601.[5]

In her cross-complaint, Victoria D. sought a declaration of her rights regarding Michael H. and Gerald D. and claimed she had either a legal or a de facto/psychological relationship with both of them and was entitled to "care, supervision, support and rights of inheritance" from such de facto father. In his complaint, Michael H. also sought reasonable visitation rights with Victoria D.

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[5] Civil Code section 4601 provides: "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to *any other person having an interest in the welfare of the child.*" (Italics added.)

The trial court had earlier granted Michael H. visitation rights pendente lite pursuant to section 4601, but those rights terminated when the court invoked the conclusive presumption of section 621 and granted summary judgment in favor of Gerald D.

First, we note there is no support for the proposition that the law recognizes both a legal, or de jure, *and* a de facto father of the same child. The case upon which Victoria D. relies, *Guardianship of Philip B.* (1983) 139 Cal.App.3d 407 [188 Cal.Rptr. 781], is inapposite. *Philip B.* involved a custody dispute over a child afflicted with Down's Syndrome waged by his parents against the child's court-appointed guardians who had developed a deep relationship with the child over a long period of time. The court described the guardians as "de facto parents" in explaining why an award of custody to the natural parents, rather than to the guardians, would be detrimental to the child.

In the case at bar, there is no hint that Carole D. and Gerald D. should be deprived of the custody of Victoria D. *Philip B.* has nothing whatsoever to do with the contention that a child may have more than one father, that contention was expressly rejected by the Court of Appeal in *Vincent B. v. Joan R., supra,* 126 Cal.App.3d 619, which observed: "In enacting a conclusive presumption, the Legislature must have intended that only one man can be adjudicated a child's father." (*Id.* at p. 627.)

Here, by granting summary judgment in favor of Gerald D. "pursuant to *Vincent B. v. Joan R.* and 621, as to complaint and cross-complaint," the trial court impliedly determined not only that Gerald D. was the presumed father of Victoria D., but also that Michael

H. has no legal rights regarding Victoria D. and is not entitled to rights of visitation under section 4601.

In *Vincent B.*, after the Court of Appeal upheld the conclusive presumption in favor of the natural mother's then ex-husband, it stated: "Finally, appellant contends that even if Frank is conclusively presumed to be Z.'s father, appellant should be allowed visitation rights, since Civil Code section 4601 gives discretion to grant visitation rights to 'any other person having an interest in the welfare of the child.' We think it obvious in the circumstances of this case such court-ordered visitation would be detrimental to the best interests of the child. Appellant's interest in visiting the child is based on his claim that appellant is Z.'s father. Such claim is now determined to be legally impossible. The mother does not wish the child to be visited by appellant. Confusion, uncertainty, and embarrassment to the child would likely result from a court order that appellant, who claims to be Z.'s biological father, is entitled to visitation against the wishes of the mother." (*Vincent B. v. Joan R., supra,* 129 Cal.App.3d at pp. 627-628.)

DISPOSITION

Summary judgment is affirmed. The case is remanded to the trial court so that it may determine, and make appropriate orders with regard to, the attorneys' fees and costs, if any, to which Victoria D. is entitled. The parties are to bear their own costs on appeal.

Lui, Acting P. J., and Danielson, J., concurred.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on October 28, 1987, I served the within $Jurisdictional Statement in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
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(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 28, 1987, at Los Angeles, California.

Claude A. Lagardere
(Original signed)